

[Cite as *Cross v. A-Best Prods. Co.*, 2009-Ohio-3079.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 90388

MILTON B. CROSS, ET AL.

PLAINTIFFS-APPELLEES

vs.

A-BEST PRODUCTS CO., ET AL.

DEFENDANTS

Appeal by:

AMERICAN OPTICAL CORPORATION

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-415636

BEFORE: Sweeney, J., Stewart, P.J., and Boyle, J.

RELEASED: June 25, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the

announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

JAMES J. SWEENEY, J.:

{¶ 1} This asbestos-related case is before us on appeal after the trial court issued a supplemental clarifying journal entry on May 18, 2009, based on this Court's limited remand ordered on April 29, 2009. The narrow issue to be decided in this appeal is whether the R.C. 2307.93(A)(3) savings clause applies to plaintiff-appellee, Milton B. Cross's ("Cross") claim, thus allowing him to maintain his asbestos-related action against defendant-appellant, American Optical Corporation ("AOC"). After reviewing the facts of the case and pertinent law, we affirm the court's denial of AOC's motion to dismiss.

{¶ 2} The procedural history of this case follows.¹ On August 19, 2000, Cross filed suit against AOC, a manufacturer of asbestos containing protective clothing, alleging asbestos-related lung injuries. On August 10, 2007, AOC filed a motion to dismiss Cross's claim, alleging that he had not established the statutory requirements of Amended Substitute House Bill 292, which was enacted in 2004. Cross counter argued that retroactive application of Am.Sub.H.B. 292 was unconstitutional as applied to him, citing the statute's savings clause, R.C.

¹The substantive facts of the instant case have been thoroughly discussed in our remand order. See *Cross v. A-Best Products Co.*, Cuyahoga App. No. 90388, 2009-Ohio-2039.

2307.93(A)(3)(a). On September 7, 2007, the trial court summarily denied AOC's motion to dismiss Cross's claim.

{¶ 3} AOC appealed and we issued a limited remand with instructions to the trial court to clarify its September 7, 2007 dismissal. On May 18, 2009, the trial court issued a clarifying entry. We now review AOC's appeal on the merits.

{¶ 4} AOC's sole assignment of error states:

{¶ 5} "The trial court erred when it entered an order making an R.C. 2307.93(A)(3) finding that the prima-facie requirements enacted by Am.Sub.H.B. No. 292 and codified at R.C. 2307.92 cannot be applied retroactively because their application impairs plaintiff-appellee Milton Cross's substantive rights in violation of Section 28, Article II of the Ohio Constitution."

{¶ 6} On September 2, 2004, Am.Sub.H.B. 292 became effective, and its key provisions were codified in R.C. 2307.91 through 2307.98. The statutes require plaintiffs who assert asbestos claims to make a prima facie showing by a competent medical authority that exposure to asbestos was a substantial contributing factor to their medical condition resulting in a physical impairment. Stated in other words, the Ohio Legislature found that prioritizing these cases "will expedite the resolution of claims brought by those sick claimants and will ensure that resources are available for those who are currently suffering from asbestos-related illnesses and for those who may become sick in the future." Am.Sub.H.B. 292, Section 3(A)(5). See, also, *Sinnott v. Aqua-Chem, Inc., et al.*, 116 Ohio St.3d 158, 160, 2007-Ohio-5584, 876

N.E.2d 1217 (stating that requiring prima facie evidence by an asbestos plaintiff “is an attempt to place those already ill at the head of the line for compensation”).

{¶ 7} If a plaintiff fails to make this prima facie showing, the court must administratively dismiss the claim. “The court shall maintain its jurisdiction over any case that is administratively dismissed under this division. Any plaintiff whose case has been administratively dismissed under this division may move to reinstate the plaintiff’s case if the plaintiff makes a prima-facie showing that meets the minimum requirements” discussed above. R.C. 2307.93(C).

{¶ 8} In *Ackison v. Anchor Packing Co.*, 120 Ohio St.3d 228, 2008-Ohio-5243, the Ohio Supreme Court found these new requirements may be applied retroactively to cases pending on September 2, 2004.

{¶ 9} However, the legislature included a savings clause in R.C. 2307.93(A)(3)(a), which allows the law prior to September 2, 2004 to govern an asbestos plaintiff’s case under certain circumstances. R.C. 2307.93(A)(3) provides as follows:

{¶ 10} “(a) For any cause of action that arises before the effective date of this section, the provisions set forth in divisions (B), (C), and (D) of section 2307.92 of the Revised Code are to be applied unless the Court that has jurisdiction over the case finds both of the following:

{¶ 11} “(i) A substantive right of a party to the case has been impaired.

{¶ 12} “(ii) That impairment is otherwise in violation of Section 28 of Article II, Ohio Constitution.”

{¶ 13} On remand, the trial court found the following:

{¶ 14} “At the time Mr. Cross’s asbestos-related lung cancer claim accrued and was filed, the definition of ‘competent medical authority’ was determined by established rules of evidence regarding a witness’s competency to testify. See Evid.R. 702. Requiring Mr. Cross to satisfy the new definition of ‘competent medical authority’ would deprive him the ability to maintain his claim. ***

{¶ 15} “***

{¶ 16} “Applying the Act’s requirements now would effectively eliminate Mr. Cross’s previously viable claim for asbestos-related lung cancer. The Court, therefore, finds that a substantive right of Mr. Cross’s would be impaired, and that impairment is otherwise in violation of Section 28, Article II of the Ohio Constitution. See R.C. 2307.93(A)(3)(a).

{¶ 17} “Having made a finding under R.C. 2307.93(A)(3)(a), this Court next determines under R.C. 2307.93(A)(3)(b) whether Mr. Cross has provided sufficient evidence to support his cause of action or the right to relief under the law that was in effect prior to the effective date of the Act. The law that was in effect prior to Am.Sub.H.B. 292 was R.C. §2305.10. It states:

{¶ 18} ‘a cause of action for bodily injury caused by exposure to asbestos *** arises upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has been injured by such exposure, or upon the date on which, by the exercise of reasonable diligence, the plaintiff should have become

aware that the plaintiff had been injured by the exposure, whichever date occurs first.’ R.C. §2305.10.

{¶ 19} “As noted previously, Mr. Cross submitted the medical reports of Dr. Venizelos, Dr. Schonfeld, and Dr. Pohl, all of whom have been qualified as experts to testify before this Court previously. The Court finds that Mr. Cross has presented sufficient evidence under R.C. §2305.10 by proffering medical opinions that his injuries were caused by exposure to asbestos. Discovery is complete, AO’s Motion for Summary Judgment has been denied, and all expert reports have been produced. The only remaining issue to be determined at trial is whether he is able to prove the elements of a cause of action under the law prior to September 2, 2004. Plaintiff’s case is ready for a trial date.

{¶ 20} “Finally, a finding that Mr. Cross’s claims are within the Act’s Savings Clause conforms with the stated intent of the statute, by compensating ‘cancer victims and others who are physically impaired by exposure to asbestos’ and giving ‘priority to those asbestos claimants who can demonstrate actual physical harm from exposure to asbestos.’ See Am.Sub.H.B. 292 §3(B), *supra*.”

{¶ 21} We find that the trial court’s conclusion that the Am.Sub.H.B. 292 requirements were unconstitutional as applied to Cross because they acted to “eliminate Cross’s previously viable claim” is well reasoned. See *Olson v. Consol. Rail Corp.*, Cuyahoga App. No. 90790, 2008-Ohio-6641 (holding that the court did not err in applying the savings clause to a case that had five non-asbestos related claims in addition to the plaintiff’s claim of an asbestos-related injury). “Through the

savings clause, the General Assembly specifically recognized that the retroactive application of H.B. 292 will not always be appropriate. Indeed, by enacting R.C. 2307.93(A)(3)(a), the General Assembly carved out an exception to the retroactive application of H.B. 292 in all cases.” *Olson*, supra at ¶14. See, also, *State ex rel. Internatl. Heat & Frost Insulators & Asbestos Workers Local v. Cuyahoga Cty. Court of Common Pleas*, Cuyahoga App. No. 85116, 2006-Ohio-274 (concluding that R.C. 2307.93(A)(3) “reaffirms the authority of the court of common pleas to make determinations regarding constitutionality”).

{¶ 22} Accordingly, the court did not err in denying AOC’s motion to dismiss and AOC’s sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant his costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, JUDGE

**MELODY J. STEWART, P.J., and
MARY J. BOYLE, J., CONCUR**